Teh Swee Lip v Jademall Holdings Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–404 OF 2010
RAMLY ALI, DAVID WONG AND ZAWAWI SALLEH JJCA
7 JULY 2013

Contract — Breach — Oral agreement — Appeal from High Court — Joint venture agreement for land — Alleged mutual termination agreement — Taking over of land by developer — Whether there was oral agreement allowing taking over of development of land

The appellant was the son of and administrator of the estate of the late Datin Lim Tuan who during her lifetime had entered into a joint venture agreement with Good Carriage Sdn Bhd ('Good Carriage') in respect of a Bentong land. Good Carriage and Datin Lim Tuan entered into a mutual termination agreement in which Good Carriage agreed to cease as the developer on the condition that Datin Lim Tuan paid Good Carriage the estimated value of the goods and materials, site office and equipments left at the site which totaled up to the sum of RM80,000. The respondent contended that the Datin Lim Tuan through her eldest son ('Teh Swee Seng') had agreed to allow the respondent to take over the project in consideration of the respondent agreeing to pay the sum of RM80,000 to Teh Swee Seng to pay off or compensate Good Carriage. Payment was effected by the respondent to a company allegedly linked to Teh Swee Seng. Subsequent to such payment, there were various correspondence between the parties in which the respondent contended that there existed an oral agreement in which they were allowed to take over the development of the Bentong land. The appellant's argued that there was no such oral agreement and that Teh Swee Seng had no authority to act on behalf of Datin Lim Tuan. In the High Court, the judge found that there occurred a breach of an oral agreement. Hence, the present appeal.

Held, allowing the appeal with costs of RM20,000 for here and below:

(1) When there is a finding of fact by the trial court, the appellate court would always be slow to overturn the findings except when the same was against the weight of evidence. In this appeal, the learned judge had erred in not looking at the totality of the evidence and if she had done that, she would have come to a different conclusion. Hence, the court was left with no other option but to interfere in this appeal (see para 21).

(2) The respondent's case was premised on the fact that Teh Swee Seng had agreed on behalf of Datin Lim Tuan to allow the respondent to take over Good Carriage in the development of the Bentong land. That being the

case, Teh Swee Seng should have been called as a witness to prove the existence of the oral agreement and the payment of RM80,000 as he was a pivotal witness and the non-calling of him as a witness might give rise to the invocation of s 114(g) of the Evidence Act 1950 ('Act') (see para 13).

(3) It must not be forgotten that the burden to prove was on the person who asserts and in this case it was the respondent who had asserted that there was an oral agreement and breach of the same. When the person who was most privy to that assertion was not called as a witness, that burden had not been met. For that reason alone, there was no necessity to invoke the 'adverse inference' available in s 114(g) of the Evidence Act 1950 against the respondent (see para 15).

[Bahasa Malaysia summary

Perayu adalah anak kepada pentadbir estet mendiang Datin Lim Tuan yang pada masa hidupnya telah memasuki perjanjian usahasama dengan Carriage Sdn Bhd ('Good Carriage') berkenaan tanah Bentong. Good Carriage dan Datin Lim Tuan memasuki perjanjian penamatan bersama di mana Good Carriage bersetuju untuk berhenti sebagai pemaju atas syarat bahawa Datin Lim Tuan membayar Good Carriage nilai anggaran barangan dan material, pejabat tapak bina dan pelengkapan-pelengkapan yang ditinggalkan di tapak binaan yang mana keseluruhannya berjumlah RM80,000. Responden berhujah bahawa Datin Lim Tuan melalui anak lelaki sulongnya ('Teh Swee Seng') telah bersetuju untuk membenarkan responden mengambil alih projek dalam balasan responden bersetuju untuk membayar wang sejumlah RM80,000 kepada Teh Swee Seng untuk membayar atau mempampasi Good Carriage. Bayaran dijelaskan oleh responden kepada syarikat yang didakwa mempunyai hubungan dengan Teh Swee Seng. Selepas bayaran sedemikian, terdapat pelbagai surat menyurat di antara pihak-pihak tersebut di mana responden berhujah bahawa wujud perjanjian lisan di mana mereka dibenarkan untuk mengambil alih pembangunan tanah Bentong. Perayu berhujah bahawa tidak terdapat perjanjian lisan sedemikian dan bahawa Teh Swee Seng tidak mempunyai kuasa untuk bertindak bagi pihak Datin Lim Tuan. Di Mahkamah Tinggi, hakim mendapati bahawa terdapat kemungkiran perjanjian lisan. Maka rayuan ini.

Diputuskan, membenarkan rayuan dengan kos RM20,000 untuk mahkamah ini dan Mahkamah Tinggi:

(1) Apabila terdapat dapatan fakta oleh mahkamah perbicaraan, mahkamah rayuan akan perlahan untuk mengubah dapatan kecuali apabila ianya adalah bertentangan beban keterangan. Dalam rayuan ini, hakim yang bijaksana telah tersilap dalam tidak melihat kepada keseluruhan keterangan dan jika beliau berbuat demikian, beliau akan mencapai

keputusan yang berbeza. Maka, mahkamah tidak mempunyai opsyen lain selain daripada campur tangan dalam rayuan ini (lihat perenggan 21).

(2) Kes responden adalah berdasarkan atas fakta bahawa Teh Swee Seng telah bersetuju bagi pihak Datin Lim Tuan untuk membenarkan responden mengambil alih Good Carriage dalam membangunkan tanah Bentong. Atas fakta ini, Teh Swee Seng patut dipanggil sebagai saksi untuk membuktikan kewujudan perjanjian lisan dan bayaran RM80,000 memandangkan dia adalah saksi utama dan dengan tidak memanggil dia sebagai saksi akan membangkitkan s 114(g) Akta Keterangan 1950 ('Akta') (lihat perenggan 13).

(3) Mesti beringat bahawa beban untuk membuktikan adalah atas orang yang mendesak dan dalam kes ini adalah responden yang mendesak bahawa terdapat perjanjian lisan dan kemungkirannya. Apabila orang yang bersubahat dengan desakan tersebut tidak dipanggil sebagai saksi, beban tidak dipenuhi. Untuk alasan ini saja, tidak ada keperluan untuk membangkitkan 'adverse inference' yang terdapat di dalam s 114(g) Akta terhadap responden (lihat perenggan 15).]

Notes

For cases on oral agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 reissue) paras 3126–3131.

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Masters v Cameron (1954) 91 CLR 353, HC (refd)

Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42; [2004] 3 CLJ 679, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101(1), 114(g)

R Sivarasa (R Kengadharan with him) (R Kengadharan & Co) for the appellant.
Mohd Faizal Ahmad (Hazelin & Associates) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge allowed the respondent's claim that there was a breach of an oral agreement between the respondent and appellant in respect of the construction project of houses on the appellant's land in Bentong, Pahang ('Bentong land').

[2] The appellant and respondent are the defendant and plaintiff respectively in the High Court.

[3] On 1 July 2013 we heard the appeal and after due consideration by us, we allowed the appeal for reasons set out below.

BACKGROUND FACTS

[4] The appellant is the son of and was appointed as the administrator of the estate of the Datin Lim Tuan, the deceased by an order of the court dated 20 August 2004. Datin Lim Tuan is the original defendant and the appellant was substituted as the defendant by virtue a letter of administration dated 20 August 2004 of the estate of Datin Lim Tuan.

[5] Datin Lim Tuan during her lifetime had entered into a joint venture agreement dated 7 October 1998 with Good Carriage Sdn Bhd in respect of the Bentong land in which Good Carriage Sdn Bhd was appointed the developer.

[6] In 16 June 1999, Good Carriage Sdn Bhd and Datin Lim Tuan entered into a mutual termination agreement in which Good Carriage Sdn Bhd agreed to cease as the developer on the condition that Datin Lim Tuan pays Good Carriage Sdn Bhd 'the sum of RM80,000 being the estimated value of the goods and materials, site office and equipments left at the site'.

[7] It is the contention of the respondent that the Datin Lim Tuan through her eldest son Teh Swee Seng had agreed to allow the respondent to take over the project in consideration of the respondent agreeing to pay the sum of RM80,000 to the eldest son to pay off or compensate Good Carriage Sdn Bhd. Payment was effected by the respondent to a company allegedly linked to Teh Swee Seng.

[8] Subsequent to such payment, there were various correspondence between the parties in which the respondent contended that there existed an oral agreement in which they were allowed to take over the development of the Bentong land.

[9] The appellant's contention is simply that there was no such oral agreement on the ground nothing had been agreed between the appellant and the respondent. Further it was contended that the eldest son had no authority to act on behalf of his mother Datin Lim Tuan.

THE HIGH COURT DECISION

[10] The learned judge from the outset found that the respondent's cause of

action is premised on breach of an oral agreement. As for the formation of the oral agreement, the learned judge's reasoning can be seen in this paragraph of her judgment:

> The plaintiff (the respondent) has through oral evidence as adduced through SP1, SP2 and SP3 and documentary evidence established, inter alia, that:
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> (1) The sum of RM80,000 was paid to Teh Swee Seng;
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> (2) That the deed of mutual termination was entered into after the payment of the sum of RM80,000 and this figure was expressly set out in cl 4 of the deed of mutual termination; and
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> (3) The draft building agreement was prepared by the defendant's own solicitors and sent to the plaintiff's solicitors and both solicitors had entered into correspondence to finalise the terms of the draft building agreement.
>
> I find that on the balance the plaintiff has proved its case against the defendant that an oral agreement had been entered into between the plaintiff and the defendant as represented by Teh Swee Seng. If Teh Swee Seng had not represented the deceased, then Messrs Loke, Chew & Zainal, who held out themselves to represent the defendant, would not have proceeded to draft the building agreement and negotiate the terms of the draft building agreement.

OUR GROUNDS OF DECISION

[11] As the learned judge premised on the existence of an oral agreement, it would be appropriate to remind ourselves of the basic ingredients required to create a contract. In *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679, the Court of Appeal cited with approval the following passage in *Masters v Cameron* (1954) 91 CLR 353 (as did the Federal Court in the case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625):

> Where the parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

> In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

[12] We now apply the above principle to the factual matrix herein.

[13] The respondent's case is premised on the fact that Teh Swee Seng had agreed on behalf of her mother to allow the respondent to take over Good Carriage Sdn Bhd in the development of the Bentong land. That being the case, we are surprised (to put in mildly) why the respondent did not call Teh Swee Seng as a witness to prove the existence of the oral agreement and the payment of RM80,000. We are of the view that Teh Swee Seng is a pivotal witness and the non-calling of him as a witness may give rise to the invocation of s 114(g) of the Evidence Act 1950.

[14] He is a pivotal for the simple reason as he could have resolved the matters raised by learned counsel for the appellant which are as follows:

(a) did SP1 make the payment to Teh Swee Seng as trustee for his mother?

(b) why was the payment made to Syarikat Kien Seng allegedly linked to Teh Swee Seng?

(c) why was not anyone from Syarikat Kien Seng to confirm that the payment was meant for Good Carriage Sdn Bhd? and

(d) why was there no document to support the payment and receipt of RM80,000?.

These matters remain unresolved to the detriment to the respondent which with respect was not considered by the learned judge.

[15] At the risk of repetition, we wish to remind litigants and their legal advisers that it must not be forgotten that the burden to prove is on the person who asserts and in this case it is the respondent who had asserted that there was an oral agreement and breach of the same. And when the person who is most privy to that assertion is not called as a witness, that burden has not been met (see s 101(1) of the Evidence Act). For that reason alone there is no necessity for us to invoke the 'adverse inference' available in s 114(g) of the Evidence Act against the respondent.

[16] The learned judge also relied on the fact the preparation of the draft building agreement by Loke Chew & Zainal and the sending of the same to the respondent's solicitor Yacob Atan & Associates to infer that if there is no

concluded agreement why should the appellant sent a draft to the respondent. With respect this inference cannot be drawn as it does not take into consideration of the other evidence before the court.

[17] If one is to look at the letter dated 25 August 1999 written by the respondent's solicitors to the appellant's solicitors (which is a letter of reply to the draft building agreement requesting for some changes to the terms and conditions contained therein), there contains two illuminating words 'counter propose'. These two words in our view in their natural meanings can only mean one thing and that is the parties are still negotiating on the terms and conditions of the building agreement. In such circumstances, there cannot be any 'meeting of minds' when parties are still negotiating.

[18] Furthermore, the letter dated 28 October 1999 by the appellant's solicitor in replying to the respondent's letter dated 25 August 1999 makes it crystal clear that there is to be no agreement until a formal agreement is signed. Our reasons for saying that are these.

[19] That letter dated 28 October 1999 is firstly marked 'without prejudice' and what that means in law is that letters written on a without prejudice basis is not admissible in evidence of the negotiations undertaken. The rationale of such principle is simply not to hamper but to encourage and enlarge the scope of negotiations so that an acceptable solution between the parties can be easily reached. Counsel for the appellant had not submitted to us good reasons why we should depart from established law.

[20] In any event, it also contained a concluding paragraph which reads as follows:

> Please let us have your client's comment in the aforesaid within Twenty-One (21) days from the date hereof. However, if no formal agreement has been agreeable by the parties within seven (7) days thereafter, all negotiations are deemed to have been aborted

Of course there was no reply to the just mentioned letter. Hence the parties cannot be any clearer and that is until the terms have been agreed there is to be no agreement. In the circumstances we find that what we have in this appeal is the third category of cases mentioned in *Masters v Cameron*.

CONCLUSION

[21] We are fully aware of the established principle of law that when there is a finding of fact by the trial court, the appellate court will always be slow to overturn the findings except when the same is against the weight of evidence. In this appeal, we are of the view that the learned judge had erred in not looking

A at the totality of the evidence and if she had done that we have no doubt she would have come to a different conclusion. Hence we are left with no other option but to interfere in this appeal.

B **[22]** For reasons stated above, we allowed the appeal with costs in the sum of RM20,000 for here and below. Accordingly the judgment of the High Court is set aside and we also order that the deposit be refunded to the appellant.

Appeal allowed with costs of RM20,000 for here and below.

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Reported by Afiq Mohamad Noor

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